NEW HAMPSHIRE SUPREME COURT ADVISORY COMMITTEE ON RULES

REQUEST FOR PUBLIC COMMENT ON PROPOSALS TO AMEND RULES OF PROFESSIONAL CONDUCT

The New Hampshire Supreme Court Advisory Committee on Rules is considering a Report of the New Hampshire Bar Association Ethics Committee on Revisions to the Rules of Professional Conduct, and a recommendation of the Pro Bono Referral Program to revise Rule 6.1 of the Rules of Professional Conduct. The Advisory Committee has voted to request preliminary PUBLIC COMMENT on these proposed revisions from any member of the public, the bench, or the bar.

The text of the Ethics Committee's proposals regarding the Rules of Professional Conduct appears in Appendix A, and the text of the Pro Bono Referral Program's proposal appears in Appendix B. The text of both proposals is available on the Internet at:

http://www.courts.state.nh.us/committees/adviscommrules/index.htm

Comments on any of the proposals may be submitted in writing to the secretary of the Advisory Rules Committee, at the N.H. Supreme Court Building, 1 Noble Drive, Concord, New Hampshire 03301 (Tel. 271-2646), at any time on or before September 1, 2006. Comments may also be e-mailed to the Committee on or before September 1, 2006, at:

rulescomment@courts.state.nh.us

New Hampshire Supreme Court
Advisory Committee on Rules

By: Linda S. Dalianis, Chairperson
and David S. Peck, Secretary

June 26, 2006

APPENDIX A

ETHICS COMMITTEE'S PROPOSALS TO REVISE THE RULES OF PROFESSIONAL CONDUCT

Statement Of Purpose

The Rules of Professional Conduct constitute the disciplinary standard for New Hampshire lawyers. Together with law and other regulations governing lawyers, the Rules establish the boundaries of permissible and impermissible lawyer conduct.

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the context of legal representation and of law itself. Some of the Rules are imperatives, expressed by the terms "shall" or "shall not". Others, generally expressed by the term "may", are permissive and define areas in which the lawyer may exercise professional judgment.

The Rules are not designed to be a basis for civil liability. The purpose of the Rules can be subverted when the Rules are invoked by opposing parties as procedural weapons. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. Violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer from a position or from pending litigation. Nevertheless, as the Rules establish a standard of conduct for lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

The Rules of Professional Conduct are promulgated and amended by the Supreme Court of the State of New Hampshire with due input from members of the New Hampshire Bar and interested members of the public. Each Rule is published together with the applicable ABA Comment, as adopted by the American Bar Association in conjunction with its Model Rules of Professional Conduct. Following the ABA Comments may be found a New Hampshire Comment, which may describe distinctions between the Rule as adopted in New Hampshire and the respective ABA Model Rule. The ABA and New Hampshire Comments are intended to be interpretive, not mandatory. The New Hampshire Comments are provided by the Ethics Committee of the New Hampshire Bar Association.

Lawyers have traditionally aspired to higher standards of professionalism than should be made mandatory in the Rules. Professionalism encompasses civility,

competence, conscience, contribution to the quality of the legal system including equal access to the courts, and public service.

New Hampshire Comment

The Statement of Purpose replaces the ABA Model Preamble and Scope in their entirety. The New Hampshire Supreme Court has not adopted the existing ABA Model Preamble and Scope, so that there is no base text to amend. The NHBA Ethics Committee found that, in both the existing and the proposed ABA Model Preamble and Scope, the following defects exist:

Much of the Preamble and Scope consists of imprecise restatements or summaries of the Rules, which are generally unnecessary, potentially confusing, or both.

It is inappropriate for the Statement of Purpose to attempt to codify when the Rules should or should not be used by disciplinary bodies, or how degrees of punishment for violations should be determined.

Portions of the Preamble and Scope are aspirational in nature, which runs the risk of converting goals into mandates. The Rules will succeed better if the distinction between worthy aspirations and basic mandates is kept clear.

The length and lack of clarity in the wording of the Preamble and Scope materially diminish their utility to their readers.

Rule 1.0. Definitions

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Rule 1.1. Competence

(a) A lawyer shall provide competent representation to a client.

(b) Legal competence requires at a minimum:

(1) specific knowledge about the fields of law in which the lawyer practices;

(2) performance of the techniques of practice with skill;

(3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;

(4) proper preparation; and

(5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.

(c) In the performance of client service, a lawyer shall at a minimum:

(1) gather sufficient facts regarding the client's problem from the client, and from other relevant sources;

(2) formulate the material issues raised, determine applicable law and identify alternative legal responses;

(3) develop a strategy, in consultation with the client, for solving the legal problems of the client; and

(4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.

New Hampshire Comment

The New Hampshire Rule continues the prior New Hampshire Rule, expanding on the Model Rule to serve both as a guide and objective standard. The Model Rule standards of legal knowledge, skill, thoroughness, and preparation reasonably necessary are rejected as being too general.

Rule 1.2. Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent In providing limited representation, the lawyer's responsibilities to the client, the court and third parties remain as defined by these Rules as viewed in the context of the limited scope of the representation itself; and court rules when applicable.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) It is not inconsistent with the lawyer's duty to seek the lawful objectives of a client through reasonably available means, for the lawyer to accede to reasonable requests of opposing counsel that do not prejudice the rights of the client, avoid the use of offensive or dilatory tactics, or treat opposing counsel or an opposing party with civility.

(f) In addition to requirements set forth in Rule 1.2(c),

(1) a lawyer may provide limited representation to a client who is or may become involved in a proceeding before a tribunal (hereafter referred to as litigation), provided that the limitations are fully disclosed and explained, and the client gives informed consent to the limited representation. The form set forth in section (g) of this Rule has been created to facilitate disclosure and explanation of the limited nature of representation in litigation. Although not prohibited, the provision of limited representation to a client who is involved in litigation and who is entitled as a matter of law to the appointment of counsel is discouraged.

(2) a lawyer who has not entered an applicable limited appearance, and who provides assistance in drafting pleadings, shall advise the client to

comply with any rules of the tribunal regarding participation of the lawyer in support of a pro se litigant.

(g) *Sample form.*

CONSENT TO LIMITED REPRESENTATION

Limited Representation

To help you in litigation, you and a lawyer may agree that the lawyer will represent you in the entire case, or only in certain parts of the case. "Limited representation" occurs if you retain a lawyer only for certain parts of the case.

When a lawyer agrees to provide limited representation in litigation, the lawyer must act in your best interest and give you competent help. However, when a lawyer and you agree that the lawyer will provide only limited help,

- the lawyer **DOES NOT HAVE TO GIVE MORE HELP** than the lawyer and you agreed.
- the lawyer **DOES NOT HAVE TO HELP** with any other part of your case.

If you and a lawyer have agreed to limited representation in connection with litigation, you should complete this form and sign your name at the bottom. Your lawyer will also sign to show that he or she agrees. If you and the lawyer both sign, the lawyer agrees to help you by performing the following **limited services**:

1. ☐ Provide you general advice about your legal rights and responsibilities in connection with potential litigation concerning:

_____

_____

which advice shall be provided as:

☐ consultation at a one-time meeting, or

☐ consultation at an initial meeting and further meetings, telephone calls or correspondence (by mail, fax or email) as needed, or as requested by you

2. ☐ Assist in the preparation of your court or mediation matter regarding

_____ by:

[Case name]

□ explaining court procedures

□ reviewing court papers and other documents prepared by or for you

□ suggesting court papers for you to prepare

□ drafting the following court papers for your use:

_____

_____

□ legal research and analysis regarding _____

□ preparation for court hearing regarding _____

_____; or

□ preparation for mediation

□ other: _____

3. □ Representing you in Court regarding _____,
[Case name]

but only for the following specific matter(s):

□ Motion for _____

_____

□ Temporary hearing

□ final hearing

□ trial

□ other: _____

_____

4. □ Other limited service:_____

_____

Consent

I have read this Consent to Limited Representation Form and I understand what it says. As the lawyer's client, I agree that the legal services specified above are the **only** legal help this lawyer will give me. **I understand and agree that:**

- the lawyer who is helping me with these services is not my lawyer for any other purpose and does not have to give me any more legal help
- the lawyer is not promising any particular outcome
- because of the limited services to be provided, the lawyer has limited his or her investigation of the facts to that necessary to carry out the identified tasks with competence and in compliance with court rules
- if the lawyer goes to court with me, the lawyer does not have to help me afterwards, unless we both agree in writing

I agree the address below is my permanent address and telephone number where I may be reached. I understand that it is important that my lawyer, the opposing party and the court handling my case, if applicable, be able to reach me at this address. I therefore agree that I will inform my lawyer or any Court and opposing party, if applicable, of any change in my permanent address or telephone number.

A separate fee agreement □ was □ was not also signed by me and my lawyer.

_____	_____
[print or type your name] **Client's Name**	[print or type your full mailing street/apartment address]
_____	_____
[sign your name]	[print or type City, State and Zip Code]
_____	_____
Date	[print or type your Phone Number]
_____	_____
[print or type your name] **Lawyer's Name**	[print or type name of law firm]

[sign your name]

[print or type Street, City, State and Zip Code]

Date

[print or type your Phone Number]

New Hampshire Comment

1. This rule differs from the ABA Model Rule by:

Deleting the last two sentences of ABA Model Rule 1.2 (a).
Adding a second sentence to Rule 1.2(c).
Adding a new 1.2(e).
Adding a new 1.2(f).
Adding a new 1.2(g).

2. The deleted sentences of ABA Model Rule 1.2 (a) provide as follows:

"A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

The particular binding client decisions articulated in the third sentence of Rule 1.2(a) are by no means exclusive. There will obviously be other important client decisions that will be binding upon the lawyer depending upon the fact specific circumstances of any representation. The Model Rule sentences correctly state those particular client decisions that are binding upon the lawyer. However, specifically including these in the Rule may be wrongly construed by a lawyer to be the ***only*** binding decisions that can be made by a client. A lawyer must always carefully consider all client requests or decisions, in light of all relevant factors, including but not limited to, the particular fact pattern, type of representation, a client's social and economic considerations, and the scope of representation and earlier decisions reached during the representation. *See, e.g.,* Restatement Third, The Law Governing Lawyers § 21 ("Allocating the Authority to Decide Between a Client and a Lawyer"), § 22 ("Authority Reserved to a Client"), and § 23 ("Authority Reserved to a Lawyer") (2000).

3. The second sentence of Rule 1.2(c) confirms that lawyers providing limited representation are bound by all professional responsibility rules. The Rule also recognizes that these ethical obligations will need to be interpreted, or

analyzed, within the context of the limited representation. One example of such an obligation could be the duty, under Rule 1.1(c)(3), to "develop a strategy, in collaboration with the client, for solving the legal problems of the client." A client who retains an attorney for limited purposes may simply want the lawyer to research and provide the applicable law in a specific area, thereby making Rule 1.1(c)(3) inapplicable. Conversely, the lawyer's duty pursuant to Rule 4.1(a) not to make false statements to third persons is the type of fundamental obligation that would remain applicable regardless of the limits placed on the scope of representation.

4. The added provision in Rule 1.2 (e), restates a rule revision that has been adopted (in various forms) in several other states. Especially in light of a growing concern by New Hampshire practicing lawyers for the professionalism of lawyers, it is appropriate to make a distinction between following client objectives during representation, and the general civility and professionalism expected by all practicing New Hampshire attorneys. The lawyer should also be guided by The New Hampshire Lawyer Professional Creed, adopted April 4, 2001, by the New Hampshire Bar Association Board of Governors (which can be found under “NH Practice Guidelines” on the Bar’s website, www.nhbar.org).

5. A new section (f) is added to apply specific rules for the limited representation of a client in a litigation setting, which would require full disclosure and informed consent. A recommended written Consent to Limited Representation form for compliance with this provision, while not mandated, is provided in section (g). Subsection (f)(2) requires the lawyer to advise the client to comply with whatever applicable court rules may apply, with respect to any "ghost written" pleadings prepared by that lawyer who is not actually involved, by appearance, in the particular litigation.

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

New Hampshire Comment

The former New Hampshire Rule 1.3 contained additional language further defining promptness and diligence. Those additional factors, while not exhaustive, continue to be instructive with respect to the compliance with this rule. Those factors include carrying out representation in the manner and within the time parameters established by the agreement between the client and the lawyer; however the lawyer may not rely upon the terms of an agreement to excuse performance which is not prompt and diligent in light of changes in circumstances, known to the lawyer, which require adjustments to the agreed upon schedule of performance. Additionally, in all other matters of representation, it is to be carried out with avoidable harm neither to the client's interest nor to the lawyer-client relationship.

Rule 1.4. Client Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter.

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.

New Hampshire Comment

Attorneys seeking to determine the scope of the duty to communicate under this rule should also review ABA Comment 5 to Rule 2.2. That Comment states that when a matter is likely to involve litigation, Rule 1.4 may require a lawyer "to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." This comment may prove important given the overlap of Rules 2.2 and 1.4, the increasingly important role of alternative dispute resolution in litigation, and the implications this duty might have for a lawyer's civil liability.

Rule 1.5. Fees

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee or expenses include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) the fee customarily charged in the locality for similar legal services.

(4) the amount involved and the results obtained.

(5) the time limitations imposed by the client or by the circumstances.

(6) the nature and length of the professional relationship with the client.

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) whether the fee is fixed or contingent; and

[Since the Committee has not reached consensus on whether Rule 1.5(b) should be revised to require a written fee agreement, the Committee presents alternate versions:]

(b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

[OR]

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing. This paragraph does not apply in any matter in which it is reasonably foreseeable that the total cost to a client, including attorney fees, will be _____ or less.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or these rules. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses for which the client will be liable whether or not the client is the prevailing party, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) (1) A lawyer shall not enter into an arrangement for, charge, or collect any fee in a divorce or other domestic relations matter, which is contingent on:

a. securing a divorce;

b. establishing or modifying a child support, alimony, property division, or other financial order; or

c. obtaining any specific non-financial relief.

(2) However, a contingent fee arrangement is permissible, subject to 1.5(c) above, in domestic relations matters regarding:

a. enforcing a property division order or an accrued obligation for child support or alimony;

b. enforcing any other financial order; or

c. obtaining a property division of assets hidden during the divorce.

(e) A lawyer shall not enter into an arrangement to charge or collect a contingent fee for representing a defendant in a criminal case.

[Since the Committee has not reached a consensus on whether naked referral fees should be allowed, two alternate versions of Rule 1.5(8) are presented:]

[Alternative 1:]

(f) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the client agrees in writing to the division;

(2) the division is made in reasonable proportion to the services performed or responsibility or risks assumed by each, and

(3) the total fee charged by all lawyers is not increased by the division of fees and is reasonable.

[New Hampshire Comment to (f) alternative 1:]

Paragraph (f)(2) justifies the division of a fee under the "responsibility or risks assumed" language when an attorney actively participates in a matter, and disallows so-called "naked" referral fees. In an October, 1997 Practical Ethics opinion, the New Hampshire Bar Association Ethics Committee determined that in order to satisfy the "active participation" criteria of Paragraph (f)(2), a referring attorney must, at a minimum, conduct a client interview, evaluate the needs of the client in the matter, identify the potential issues in the matter, and discuss the benefit of a referral with the client prior to a referral. In the absence of active participation, an attorney dividing a fee under (f)(2) must assume the risk of professional liability with the other lawyers.

[Alternative 2: Proposed Modification to Existing NH Rule Permitting Fee Referral Without Regard to Services Performed or Risks Assumed]

(f) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is made either:

a. in reasonable proportion to the services performed or responsibility or risks assumed by each, or

b. based on an agreement with the referring lawyer;

(2) in either case above, the client agrees in a writing signed by the client to the division of fees;

(3) in either case, the total fee charged by all lawyers is not increased by the division of fees and is reasonable.

[New Hampshire Comment to (f) alternative 2:]

The New Hampshire rule differs markedly from the ABA Model Rule because it allows so-called "naked" referral fees. The ABA Model Rule allows a division of a fee between lawyers not in the same law firm only where each lawyer actively participates in a matter or assumes joint responsibility and risk for the representation of the client. The New Hampshire rule changes this requirement and allows a division of fee with a forwarding lawyer, regardless of the work performed or responsibility assumed, provided that the client consents in writing to the division of fees and the total fee is not increased because of the fee division and is reasonable. This change from the ABA Model Rule and from the previous New Hampshire rule is intended to facilitate the association of alternate counsel in order to best serve the client and is often but not exclusively used when the division is between a referring lawyer and a trial lawyer.

New Hampshire Comment

The language used in Rule 1.5(a) is substantially the same as proposed ABA Model Rule 1.5(a) and changes the prior rule in two respects. First, it replaces the prior rule's standard prohibiting a "clearly excessive fees" with the ABA Model Rule standard of an "unreasonable fee." This change reflects the fact that a "reasonableness" standard defines a lawyer's obligation to the client with respect to other aspects of their relationship governed by the Rules of Professional Conduct. See, for example, Rules 1.3(a), 1.4(a), 1.8(a), and 3.2. There is no sound policy or other reason why the reasonableness standard should not govern legal fees and expenses. As the Statement of Purpose notes, "[t]he Rules of Professional Conduct are rules of reason." Whether a fee is reasonable is subject to independent determination. Indeed, the eight factors listed in Rule 1.5(a) all bear on ascertaining the reasonableness of a fee, not whether the fee is "clearly excessive." *See In Re Kelley's Case*, 137 N.H. 314, 320 (1993) (under prior rule 1.5(a) to determine whether fee is "clearly excessive," a "generally accepted, reasonable fee" must first be determined); Restatement (Third) of the Law Governing Lawyers § 46 (proposed official draft 1998) (lawyer prohibited from charging a fee "larger than is reasonable under the circumstances").

Changing the standard under Rule 1.5(a) from "clearly excessive" to "unreasonable" raises the issue of the potential impact of a decision in a fee-shifting case that rejects a portion of the fee application as being unreasonable. This raises a concern as to whether such a ruling would pave the way for a misconduct complaint under Rule 8.4(a) since "professional misconduct" is defined to include a violation or an attempt to violate the Rules of Professional Conduct.

The New Hampshire Supreme Court has stated that "legislative authorizations for the granting of attorney's fees usually are based upon an intent to permit private parties to enforce a law as 'private attorneys general' and the realization that in many non-class action cases the verdict or damages often may be offset or even exceeded by the successful plaintiff's attorney fees." *Couture v. Mammoth Grocers, Inc.*, 117 N.H. 294, 295 (1977). In reviewing awards under fee-shifting statutes, the Court has consistently looked to rule 1.5(a), or its predecessor, to determine whether an award is reasonable. *E.g., McCabe v. Arcidy*, 138 N.H. 20 (1993); *In Re Estate of Rolfe*, 136 N.H. 294 (1992); *City of Manchester v. Doucet*, 133 N.H. 680 (1990); *Couture v. Mammoth Grocers, Inc., supra*. But in doing so, the Court has made clear that fee agreements "do not dictate the amount of attorney's fees recoverable" because the fee-shifting statute "allow[s] the court to exercise its discretion in determining a reasonable fee." *Cheshire Toyota/Volvo, Inc. v. O'Sullivan*, 132 N.H. 168, 171 (1989). The Court has noted that the fee arrangement is "but one of a number of factors for a court to consider in determining a reasonable fee," *id.*, and that "[t]here can be no rigid, precise measure of reasonableness, however, because the weight accorded each factor depends on the circumstances of each particular case." *McCabe*, 138 N.H. at 29.

Although unstated, the Court's approach in fee-shifting cases also appears to reflect the notion that the amount of fees the adverse party should bear may well differ from the amount the client should reasonably be expected to pay. In any event, none of the cases contains even a hint that a rejection of a portion of the application might raise the specter of a misconduct complaint.

Federal fee-shifting statutes serve the same general purpose as New Hampshire statutes: to encourage attorneys to take cases that otherwise might not be economically feasible or attractive. *See generally* The Civil Rights Attorneys Fees Awards Act of 1976, H.R. Rep. No. 94-1588, at 3 (1976). But awards may not produce a windfall for attorneys. *See generally* S. Rep. No. 94-1011, at 6 (1976).

The United States Supreme Court has recognized that "billing judgment" is as important in fee-shifting cases as in the private sector: "'Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.'" *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (quoting *from Copeland v. Marshall*, 641 F.2d 880, 891 (1980) (*en banc*)). Yet, the *Hensley* court stated that multiplying "reasonable hours times a reasonable rate" is only one consideration in determining a proper statutory award. *Id.* Courts also must consider whether the relief obtained is "significant," and even if significant whether the relief "is limited in comparison to the scope of the litigation as a whole." *Id.* at 440. Further, work on unsuccessful claims, even if reasonable, usually may not be considered, nor may an award be made where the documentation is inadequate. *Id.* at 433-

434. Finally, the Court has made clear that in determining reasonableness "the most critical factor is the degree of success obtained." *Id.* at 436.

Given the purposes of fee-shifting statutes, the New Hampshire Supreme Court has made clear that the determination of a reasonable fee is based on considerations that go beyond private fee agreements so the award reflects the policies served by such statutes. Its approach is consistent with federal law. For this reason, and in the absence of any reported decision in which a ruling in a fee-shifting case has been cited to support a misconduct complaint, there is only a minimal risk that adoption of an unreasonable standard would prejudice an attorney against whom a complaint of professional misconduct has been filed because a court had determined a portion of the fees was unreasonable. That minimal risk must be weighed against the benefit to be gained by adopting an unreasonable standard. Simply stated, the "clearly excessive" standard is indefensible. A lawyer should not be able to collect a fee that is unreasonable or excessive. Such a standard is neither fair to the client nor justifiable. Moreover, to permit a lawyer to charge and collect an unreasonable or excessive fee is unseemly, reflects poorly on the legal profession, and does not serve the public interest in promoting access to legal services in a country founded on the rule of law. See ABA Formal Opinion 93-379 ("A lawyer should not charge more than a reasonable fee, for excessive costs of legal service would deter a laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client"). Finally, it is difficult to imagine any argument that could be made to defend such a fee, which the public would understand, let alone accept. While how lawyers are viewed by the public cannot be the sole yardstick by which lawyer conduct is measured, in the area of legal fees it should be a paramount consideration.

The second change to Rule 1.5(a) is that it has been revised to make explicit that a lawyer may not charge an unreasonable amount for expenses for which the client is responsible. This change in the text of the rule, which is consistent with the opinions of state ethics committees, is not intended to change the substance of the prior rule. *See* ABA Formal Opinion 93-379.

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or

(2) to secure legal advice about the lawyer's compliance with these Rules; or

(3) to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or.

(4) to comply with other law or a court order.

New Hampshire Comment

The New Hampshire Rule permits the disclosure of any criminal act involving death or bodily harm or substantial injury to the financial interest or property of another. Rule 1.6 should not be viewed as a departure from the general rule of client confidentiality, and should not be interpreted to encourage lawyers to disclose the confidences of their clients. The disclosure of client confidences is an extreme and irrevocable act. Hopefully no New Hampshire lawyer will be subject to censure for either disclosing or failing to disclose client confidences, as the lawyer’s individual conscience may dictate.

Rule 1.7. Conflicts of Interest

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

New Hampshire Comment

The requirements that a lawyer maintain loyalty to a client and protect the client's confidences are fundamental. Although both the former rule 1.7 and the current rule 1.7(b) allow a lawyer to undertake representation in circumstances when there is exists a concurrent conflict of interest, the lawyer should use extreme caution in deciding to undertake such representation. The lawyer must make an independent judgment that he or she can provide "competent and diligent representation" before the lawyer can even ask for consent to proceed. The court in subsequent proceedings can review such a judgment. *See Fiandaca v. Cunningham*, 827 F.2d. 825 (1st Cir. 1987).

In evaluating the appropriateness of representation in a conflict situation under 1.7(b), the New Hampshire Bar Association Ethics Committee has used under the old rules the "harsh reality test" which states:

"(i)f a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to

this representation or question whether there had been full disclosure to the client prior to obtaining the consent. If this "harsh reality test" may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation . . . ." New Hampshire Bar Association Ethics Committee Opinion 1988-89/24 (http://nhbar.org/pdfs/f088-89-24.pdf).

This test has proven useful to practicing attorneys and retains its validity under the amended rules.

Rule 1.8. Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

New Hampshire Comment

ABA Comment 8 raises concerns. In New Hampshire, Rule 1.8(a) applies to a lawyer's advice as to, or preparation of, an instrument designating or appointing a lawyer or an affiliate of the lawyer as executor, trustee or any other fiduciary position (whether or not a family relationship exists). *See also* New Hampshire Bar Association Ethics Committee opinion 1987-88/9 (http://www.nhbar.org/pdfs/FO87-88-9.pdf) and *In re Estate of Rolfe,* 136 NH 294 (1992), 615 A 2d 625.

Rule 1.9. Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

New Hampshire Comment

The New Hampshire Supreme Court has relied upon this rule for the criteria governing the consideration of a motion to disqualify a party's former lawyer for a conflict of interest. *Sullivan County Reg. Refuse Disp. Dist. v. Town of Acworth*, 141 N.H. 479, 481-82 (1996).

Law firms and legal service organizations which handle a high volume of cases confront the limitations of this rule on a more frequent basis than do other practitioners. Firms and organizations may accept cases where a former client is a witness in the new (current client's) case if the representation of the former client is not “substantially related” to the current client’s case. Rule 1.9(a) permits such representation, but attorneys are cautioned to fully explore the definition of "substantially related" under relevant case law in the controlling jurisdiction. If such representation is permissible, attorneys in the law firm or organization must nevertheless take appropriate steps in a case that is not

substantially related to comply with Rule 1.9(c) by protecting the confidential information obtained during the representation of the former client.

The New Hampshire Public Defender has adopted a Rule 1.9(c) compliance policy in cases that are not substantially related in which a "neutral attorney" orders the former client's files sealed and prohibits any communication between the attorney who represented the former client and the attorney who represents the new client. In two cases where the State sought disqualification of the Public Defender because one of its attorneys had previously represented an individual who was a state's witness in the new case, the New Hampshire Superior Court denied disqualification and referenced with apparent approval the Public Defender's Rule 1.9(c) compliance policy. *See State of New Hampshire v. Gordon Perry*, Nos. 97-S-777 - 780 (Merrimack County Superior Court (Nadeau, J.) April 10, 1998); *State of New Hampshire v. Eric Smalley*, No. 01-S-1280 (Merrimack County Superior Court (McGuire, J.) January 29, 2002).

Rule 1.10. Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

New Hampshire Comment

The disqualification of lawyers associated in a firm with former government lawyers is governed by Rule 1.11(b) and (c).

The disqualification of lawyers associated in a firm with a lawyer-official is governed by Rule 1.11A(c).

Rule 1.11. Special Conflicts Of Interest For Former And Current Government Officers And Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

a. participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless

the appropriate government agency gives its informed consent, confirmed in writing; or

b. negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding involving a specific party or parties, including an application, request for ~~a~~ ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other proceeding; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

New Hampshire Comment

1. New Hampshire reordered the language in ABA Model Rule 1.11(e)(1) to clarify that the term "matters covers only proceedings, judicial or otherwise, involving specific parties and not general proceedings such as rulemaking or regulation.

2. In determining whether a lawyer is subject to the prohibition under section (d), a number of factors should be taken into account. These factors include, but are not limited to, whether the lawyer supervised or primarily handled a matter, whether material progress had been achieved in the matter and whether the matter was reassigned before any substantive review or tasks had been conducted. In some cases, a lawyer's supervisory status over matters handled in a public office may make it impossible to negotiate for private employment unless the public employment is terminated prior to such negotiation. In most instances, however, recusal from matters in which the potential employer is involved would be sufficient to avoid the appearance of a conflict of interest.

3. It should be noted that public offices, agencies, boards and commissions may have internal policies regarding conflicts of interest, which in some instances are more restrictive than the New Hampshire Rules of Professional Conduct.

Rule 1.11A. Conduct Of Lawyer-Officials

(a) Definitions. As used in this rule:

lawyer-official means a lawyer actively engaged in the practice of law, who is a member of a governmental body;

governmental body means any state or local governmental agency, board, body, council or commission, including any advisory committee established by any of such entities;

related body means a governmental body whose members are appointed or elected by the lawyer-official or the governmental body of which the lawyer-official is a member;

interest means a direct, personal and pecuniary interest, individually or on a client's behalf, in a matter which is under consideration by either the governmental body of which the lawyer-official is a member, or by a related body; and

advisory committee means any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

(b) No lawyer-official shall:

(1) participate in any hearing, debate, discussion or vote, or in any manner otherwise attempt to influence the outcome of a matter in which the lawyer-official has an interest;

(2) utilize information obtained in such capacity for his or her own personal benefit or that of his or her clients or the clients of the firm with which the lawyer-official is associated;

(3) appear on behalf of a client before any governmental body of which the lawyer-official is a member or any related body;

(4) accept anything of value from any person or organization when the lawyer-official knows or reasonably should know that the offer is for the purpose of influencing the lawyer-official's actions or decisions as a lawyer-official;

(5) use his or her official position to influence or to attempt to influence either the governmental body of which the lawyer is a member or a related body to act in favor of the lawyer-official or the lawyer-official's clients or clients of the firm with which the lawyer-official is associated.

(c) Other lawyers in the firm with which the lawyer-official is associated may appear on behalf of clients before the governmental body of which the lawyer-official is a member, , if the lawyer-official publicly disqualifies himself or herself and refrains from participation in the matter in accordance with paragraph (b)(1) of this Rule. Other lawyers in the firm with which the lawyer-official is associated may appear on behalf of clients before a related body, if either (i) the lawyer-official has refrained from and continues to refrain from participation in any action regarding the appointment of members of the related body, or (ii) all relevant parties give their informed consent. At all times, however, the lawyer-official shall conduct himself or herself with respect to the matter in question in accordance with paragraph (b) of this Rule.

New Hampshire Comment

This Rule was not considered by the ABA. Service by members of the New Hampshire Bar to state and local government should be encouraged. This Rule is intended to facilitate rather than limit the opportunities of attorneys to serve on state and local governmental bodies. However, lawyers should not overlook the complexities inherent in obtaining consents pursuant to Section (c) of this Rule.

Rule 1.12. Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

New Hampshire Comment

The New Hampshire Rule does not provide an exception for consent by all parties to representation by a lawyer of a party in connection with a matter in which the lawyer formerly held an adjudicative position.

Rule 1.12A. Part-Time Judge

A lawyer who serves as a part-time judge may not practice in a court where he or she regularly serves as a part-time judge.

New Hampshire Comment

Rule 1.12A has no Model Rule counterpart, and amends the existing New Hampshire Rule to apply only to part-time judges practicing in a court where he or she *regularly* serves as judge.

Rule 1.13. Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

New Hampshire Comment

In New Hampshire, a lawyer who represents an unincorporated association also represents each individual member of the association as to matters of association business. *Franklin v Callum*, 148 NH 199 (2002). This rule is an exception to the prevailing "entity theory" of representation reflected in Rule 1.13. *See also* Restatement of the Law Governing Lawyers § 96 (ALI 2000); *McCabe v Arcidy,* 138 N.H. 20, 26 (1993).

Rule 1.14. Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

New Hampshire Comment

1) ABA Comment 3 says that the presence of family members or other persons during discussions with the lawyer, at the clients request "generally does not affect the applicability of the attorney-client evidentiary privilege." This comment raises concerns. The lawyer should determine if the privilege would be waived.

2) ABA Comment 5 addresses consulting with traditional "family members." For some clients, non-traditional relationships such as unmarried heterosexual, gay, or lesbian partners may be at least as important as blood or marital relationships. There may be substantial conflict between the non-traditional partner and the traditional family. Evidence of the importance of a particular relationship to the client would include express client directions set out in planning documents such as letters of intent, health care or general power of attorney, or nomination of guardian.

3) ABA Comment 7 highlights that the least restrictive action should be taken, based upon the circumstances of each client. This is consistent with the approach of New Hampshire's probate courts, in considering a guardianship over an incapacitated adult.

4) ABA Comment 4 says that the lawyer would "ordinarily look to" any legal representative (such as a guardian) for decisions. The situations in which the

client's legal representative should **not** be the person making decisions are limited to two situations: where the lawyer represents the client in a matter against the interests of the legal representative or where that the legal representative instructs the lawyer to act in a manner that will violate that person's legal duties toward the client. *See* Restatement Third, The Law Governing Lawyers § 24(c) (2000).

5) ABA Comment 10 states that "[n]ormally, a lawyer would not seek compensation for such emergency actions taken." In these situations there is no ethical bar to requesting compensation, where the person benefiting from the action can afford to pay for the legal services.

Rule 1.15. Safekeeping Property

(a) Property of clients or third persons which a lawyer is holding in the lawyer's possession in connection with a representation shall be held separate from the lawyer's own property. Funds shall be deposited in one or more clearly designated trust accounts in accordance with the provisions of the New Hampshire Supreme Court Rules. All other property shall be identified as property of the client, promptly upon receipt, and safeguarded.

(b) Records shall be maintained by the lawyer of the handling, maintenance and disposition of all funds and other property of the client at any time in the lawyer's possession from the time of receipt to the time of final distribution and shall be preserved for a period of six years after final distribution of such funds or other property or any portion thereof. The lawyer shall maintain the minimum financial records specified in the New Hampshire Supreme Court Rules and shall comply with every other aspect of those Rules.

(c) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount appropriate for that purpose.

(d) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(e) Funds may be disbursed from lawyer trust accounts upon (A) (i) deposit, receipt of which is acknowledged by the receiving financial institution, of cash, bank cashier's check, certified check, or electronic transfer of funds at least equal to the sum of such disbursements, or (ii) clearance of any other form of deposit by such receiving financial institution, and (B) availability of such funds to the lawyer from the receiving financial institution.

(f) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and upon request by the client or third person, shall promptly render a full accounting regarding such property.

(g) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

New Hampshire Comment

New Hampshire Supreme Court Rule 50(2)B provides that: all cash property of clients received by attorneys shall be deposited in one or more clearly designated trust accounts (separate from the attorney's own funds) in financial institutions. Any attorney depositing client funds into an out-of-state financial institution shall file a written authorization with the Clerk of the Supreme Court authorizing the Court or its agents to examine and copy such out-of-state account records. Under no circumstances may an attorney use out-of-state banks other than those located in Maine, Vermont or Massachusetts.

Paragraphs (a) and (b), which differ from ABA Model Rule 1.15(a), were drafted with the provisions of Rule 50 in mind, especially, 50(2)B. Paragraphs (c), (d), (f), and (g) follow the language of ABA Model Rule 1.15 (b), (c), (d) and (e).

With respect to the broader question regarding retention of client files generally, see Practical Ethics: Ethical Considerations and the Retention of Client Files (http://nhbar.org/pdfs/PEA3-99.pdf, 1999). That article discusses an amendment to the New Hampshire Rules of Professional Conduct, proposed in 1997 but never formally approved, providing that client files be retained for at least six years or beyond any applicable period of statute of limitations on actions, whichever is longer. The article concludes that "an attorney's analysis of whether, when, and how to discard a client or former client's file materials must begin and end with the attorney's continuing obligation to avoid prejudicing the client's interest, Rule 1.16(d)." The article also incorporates the Guidelines For Client File Retention/Disposition found in ABA Informal Opinion 1384.

While ABA Model Rule 1.15 describes the circumstances under which funds must be deposited in a lawyer's trust account, it does not specify when funds may be disbursed. This issue arises most frequently when the deposited funds are received via check or other negotiable instrument. Because funds are frequently received in this manner and oftentimes must be immediately disbursed to third parties as an integral part of transactions that lawyers are engaged in on behalf of their clients, needed guidance in this area is provided in paragraph (e). See generally RSA 382-A:3-411 which supports this treatment of bank cashier's and certified checks.

Rule 1.15 (d) provides that funds may only be withdrawn from a trust account when fees are "earned" or expenses are "incurred." This new rule, while implicitly recognizing that so-called flat fees and minimum fees are both permissible, raises questions about when such fees have been "earned" for purposes of transfer from a trust account to an attorney's business or operating account (or perhaps directly into a personal account). While the commentators offer no clear, universal rule to guide attorneys in this difficult

area, they do generally agree that Rule 1.5's requirement that any fee must be reasonable is the overarching principle governing all fee issues.[1] Because this requirement may necessitate the return of some portion of a flat or minimum fee when the lawyer cannot complete representation because of conflict or other early termination of the attorney/client relationship, many commentators believe that such fees should be considered "earned" only when work of comparable value has been performed. This view is based upon a client protection model which is designed to ensure that fees which must be returned under Rule 1.5 are retained in the lawyer's trust account. While recognizing that some commentators favor treating flat fees as "earned" upon receipt when there is a clear written fee agreement to that effect, the more prudent course is for lawyers to deposit all flat fees or minimum fees into their trust accounts to be periodically withdrawn only upon a determination that the value of services provided is in reasonable proportion to the percentage of the total fee withdrawn.

The question of non-refundable, earned upon receipt retainers was addressed in Doherty's Case, 142 N.H. 446 (1997) in the context of bankruptcy court proceedings. In that case, the bankruptcy court had found that in a bankruptcy proceeding there was no such thing as a non-refundable, earned upon receipt retainer and a lawyer's failure to segregate a client's retainer into a separate client trust account violated Rule 1.15(a)(1). The attorney admitted to this violation and the Supreme Court affirmed the referee's ruling that the attorney had violated Rule 1.15(a)-(c).

[1] Rule 1.5 does not permit a retainer for services that is absolutely non-refundable because such a fee agreement is inconsistent with the Rule's requirement that a fee must always be reasonable. However, the use of a general retainer, sometimes referred to as a "classic retainer" or an "engagement retainer," continues to be recognized as permissible by most commentators. This retainer reflects an agreement between attorney and client in which the client agrees to pay a fixed sum to the attorney in exchange for the attorney's promise to be available to perform, at an agreed upon price, legal services of a specified or general type that arise during a specified time period. Because this retainer is given in exchange for availability and not for the rendition of legal services, it is deemed to be earned when paid.

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with the applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) As a condition to termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice of the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding

any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

(e) he representation of a lawyer having entered a limited appearance as authorized by the tribunal under a limited representation agreement under Rule 1.2(f)(1), shall terminate upon completion of the agreed representation, without the necessity of leave of court, upon providing notice of completion of the limited representation to the court.

New Hampshire Comment

Section (e) is unique to New Hampshire, and is intended to encourage limited representation.

Rule 1.17. Sale Of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if each of the following conditions is satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, within the State of New Hampshire;

(b) The entire practice, or the entire area of practice (subject to the clients' rights under Rule 1.17(c)(2)), is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the active and inactive clients of the practice or practice area being sold regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

(d) The fees charged clients shall not be increased by reason of the sale***;***

(e) If a client cannot be given notice described in section (c), the representation of that client shall be transferred to the successor lawyer or law firm for the limited purpose of protecting the interests of that client as and to the same extent as the selling or prior lawyer was required to do by these Rules, and the successor lawyer or law firm shall have a continuing obligation to reasonably attempt to provide the client with such notice to the same extent as may be required by these Rules; and

(f) The successor lawyer or law firm shall take possession of all the inactive or archival files of the practice or practice area being sold, and shall store, handle, or destroy them in accordance with the normal operating procedures of the successor lawyer or law firm and these Rules. Notice of the transfer of the inactive and archival files shall be published in an appropriate newspaper of local circulation and shall be provided to the New Hampshire Bar Association.

New Hampshire Comment

Subsection (a) of the Rule permits the sale of a private practice or an area of private practice only if the seller ceases to engage in practice or in an area of practice within the State. Thus the requirements for sale are not met if the

lawyer or law firm desires to relocate to another area of the State. The individual clients' files may be transferred to the successor lawyer or law firm as and when client consents are received. After the expiration of the 90 day notice period, the files of all clients who have been given notice, and who have not opted either to retain other counsel or to take possession of their files, shall be transferred to the successor lawyer or law firm.

Subsection (e) departs from the ABA Model Rule by requiring the successor lawyer or law firm to take possession of the files of clients for whom consent could not be obtained, and by eliminating the need for prior court authorization. Such files shall be transferred for the limited purposes of attempting to effect actual written notice and protecting the clients' interests. Such file transfers are considered to be in the clients' best interests, and are not considered to violate Rule 1.6.

New subsection (f) clarifies that the successor lawyer's obligations with respect to inactive or archival files of the prior lawyer mirror the duties owed to the successor's own clients and former clients.

Rule 1.18. Duties To Prospective Client

(a) A person who provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has received and reviewed information from a prospective client shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received and reviewed information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received and reviewed disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received and reviewed the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

a. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

b. written notice is promptly given to the prospective client.

New Hampshire Comment

1. The New Hampshire rule expands upon the ABA Model Rule in one area. The ABA Model Rule 1.18(a) defines a prospective client as one who "discusses" possible representation with an attorney. Similarly, ABA Model Rule 1.18(b) establishes a general rule for protection of information received in "discussions" or "consultations".

In its version of these provisions, New Hampshire's rule eliminates the terminology of "discussion" or "consultation" and extends the protections of the

rule to persons who, in a good faith search for representation, provide information unilaterally to a lawyer who subsequently receives and reviews the information. This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other unilateral forms, and in the process disclose confidential information that warrants protection.

2. Not all persons who communicate information to an attorney unilaterally are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship (see ABA Model Rule comment No. 2); or for the purpose of disqualifying an attorney from participation in a matter; or through contemporaneous contact with numerous attorneys; is not a "prospective client" within the meaning of paragraph (a).

3. New Hampshire has concerns with ABA Comment 5, which purports to allow an attorney to secure prior "informed consent" from a prospective client that information provided in initial consultations would not preclude subsequent representation of another client in the matter. Unlike the more detailed analysis contemplated by Comment 22 to Rule 1.7, a prospective client's prior consent may be made more quickly and less likely to be "informed" as to the potential adverse consequences of such an agreement..

Rule 1.19. Disclosure of Information to the Client

(a) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement of the lawyer if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance ceases to be in effect. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(b) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(c) The notice required by paragraph (a) of this rule shall not apply to a lawyer who is engaged in either of the following:

(1) Rendering legal services to a governmental entity that employs the lawyer;

(2) Rendering legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.19 of the New Hampshire Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
(Attorney's signature)

CLIENT ACKNOWLEDGMENT

I acknowledge receipt of the notice required by Rule 1.19 of the New Hampshire Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
(Client's signature)

Date: _____

New Hampshire Comment

New Hampshire Rule 1.19 is not drawn from the ABA Model Rules.

Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Rule 2.2. [the Committee recommends repeal of Rule 2.2]

Rule 2.3. Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Rule 2.4. Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform all parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

New Hampshire Comment

1. The litigants and counsel must recognize that the neutrals will not be acting as legal advisors or legal representatives. N.H. Superior Court Rule 170(E).

2. The lawyer serving as third-party neutral should explain the specific dispute resolution process he or she is using.

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration or institutionalization, may nevertheless so defend the proceeding as to require that every element of the case be established.

New Hampshire Comment

Institutionalization is treated as comparable to incarceration for purposes of Rule 3.1.

Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know if its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

New Hampshire Comment

1. New Hampshire's Rule reverses the order of ABA Model Rules (c) and (d). This clarifies that a lawyer's disclosure obligation during an *ex parte* proceeding applies even if the information provided to the tribunal would otherwise be protected by Rule 1.6.

2. See Rule 3.9 regarding nonadjudicative proceedings.

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

a. the identity, residence, occupation and family status of the accused;

b. if the accused has not been apprehended, information necessary to aid in apprehension of that person;

c. the fact, time and place of arrest; and

d. the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Rule 3.7. Lawyer As Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work unreasonable hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 3.8. Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Rule 3.9. Advocate In Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a), (b) and (d), 3.4(a) through (c), and 3.5.

New Hampshire Comment

See also Rule 1.11A.

Rule 4.1. Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2. Communication With Person Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(f)(1) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation lawyer provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation lawyer.

New Hampshire Comment

The ABA Comments have noted that when an organization – a corporation, governmental body, or other entity – is the represented person, certain organizational personnel will be "off-limits" under Rule 4.2. This issue has frequently been the subject of litigation. The ABA Comments adopt what is known as the managing-speaking test. Several other tests have been used, known as the control group test, the blanket ban, the alter ego test and the balancing test. The New Hampshire Supreme Court has not ruled on this matter.

While not controlling on the question of permissible *ex parte* contact with employees of a corporate opponent, it is worth noting that New Hampshire has adopted the control-group test for purposes of applying the attorney-client privilege in the corporate setting. *See* N.H. R. Evid. 502(a)(2); *Klonoski v. Mahlab*, 1996 U.S. Dist. LEXIS 20360 n.2, *rev'd. on other grounds* 156 F.3d 225 (1st Cir. 1998).

Rule 4.3. Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not take any action if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, delay or burden a third person.

(b) A lawyer who receives materials relating to the representation of the lawyer's client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal.

New Hampshire Comment

Paragraph (a) substantially differs from the ABA model rule by using the word "obvious" to set a higher objective standard.

Paragraph (b) differs from the ABA model rule in three respects: the broader term "materials" replaces "document;" the phrase "reasonably should know" is deleted setting an objective standard for "knowledge"; and a second sentence is added. The second sentence incorporates the New Hampshire Bar Association's Ethics Committee's June 22, 1994, Practical Ethics Article, "Inadvertent Disclosure of Confidential Materials." The Committee concluded that notice to the sender did not provide sufficient direct guidance to lawyers.

Rule 4.5. Subpoenas

A lawyer shall not issue or obtain the issuance of a subpoena without good cause.

New Hampshire Comment

Rule 4.5 continues the existing New Hampshire Rule, for which there is no Model Rule counterpart.

Rule 5.1. Responsibilities Of Partners, Managers, And Supervisory Lawyers

(a) Each partner in a law firm, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) Each lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

New Hampshire Comment

The New Hampshire version of the rule differs from the ABA Model Rule only in the substitution of “each” for “a” in sections (a) and (b). The change is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.

Rule 5.2. Responsibilities Of A Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) Each partner, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) Each lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

New Hampshire Comment

The New Hampshire version of the rule differs from the ABA Model Rule only in the substitution of “each” for “a” in sections (a) and (b). The change is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.

Rule 5.4. Professional Independence Of A Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

New Hampshire Comment

New Hampshire permits a lawyer to share legal fees, whether or not court-awarded, with a nonprofit entity pursuant to Rule 5.4(a)(4).

Rule 5.5. Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer admitted in another United States jurisdiction who acts in this state pursuant to subparagraphs (c) or (d) shall not hold himself or herself out as being admitted to practice in this State and shall not solicit clients in New Hampshire.

New Hampshire Comment

Rule 5.5(e) is unique to New Hampshire.

Rule 5.6. Restrictions On Right To Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Rule 5.7. Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

New Hampshire Comment

Rule 5.7 identifies the circumstances in which all of the Rules of Professional Conduct continue to apply to lawyers even when the lawyer is not providing legal services to the person, or customer, for whom the law-related services are performed. Even when those circumstances do not exist, however, the lawyer will remain subject to those overarching rules that apply generally to lawyers regardless of the context. This would include - - by way of example only - - Rule 8.4(c)'s prohibition of "conduct involving dishonesty, fraud, deceit or misrepresentation," Astles' Case, 134 N.H. 602 (1991), and Rule 1.9's prohibition on the use against a former client of confidential information gained in the representation of the client, Wood's Case, 137 N.H. 698 (1993).

Rule 6.1. Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render an appropriate number of hours, consistent with the lawyer's circumstances, of pro bono publico legal services each year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of such legal services, consistent with the lawyer's expertise and interests, without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

New Hampshire Comment

New Hampshire's Rule differs from the ABA Model Rule as follows:

- in the second sentence, by deleting the reference to a specific number (such as 50) of aspirational hours of pro bono service, and in its place, inserting "an appropriate number of hours, consistent with the lawyer's circumstances"; and

- in (a), by deleting the reference to the 50 hours, and inserting “such legal services consistent with the lawyer’s expertise and interests”.

While a specific number of hours—such as 50—does provide an admirable goal for the lawyer, given the great diversity of circumstances among the practicing lawyers in this State, the “appropriate number” of hours that each lawyer should provide will vary depending upon each lawyer’s situation. And as noted in ABA Comment 1, the amount of time will also vary from year to year, again based upon the circumstances of each lawyer. Consequently, no set number of hours is incorporated in the New Hampshire Rule.

There are many factors that will reasonably impede a lawyers compliance with the preferred delivery of pro bono services as provided in (a). As stated in ABA Comment 5, there may be, in fact, practice situations that prevent a lawyer’s ability to participate in such services. By further adding the clarification “consistent with the lawyer’s expertise and interests” the New Hampshire Rule recognizes that an attorney’s specific practice area and competence may also affect compliance with this provision, or the manner of compliance (as illustrated in ABA Comments 2 and 3).

The elimination of a specific number of aspirational hours of pro bono service, or the added clarification in (a), however, should not in any way dilute the attorney’s professional responsibility, clearly stated in the first sentence of this Rule, “to provide legal services to those unable to pay”.

Rule 6.2. Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Rule 6.3. Membership In Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Rule 6.4. Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially affected by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

New Hampshire Comment

Rule 6.4 has been changed from the ABA model rule substituting the word "affected" for the word "benefitted" in the second sentence. Since situations may arise in which law reform activities may materially impinge on a client's interest in an adverse, as well as beneficial manner, the change was made to reflect that possibility.

Rule 6.5. Nonprofit And Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by the New Hampshire Bar Association, a nonprofit organization or court, provides one-time consultation with a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) Rules 1.6 and 1.9(c) are applicable to a representation governed by this Rule.

New Hampshire Comment

1. New Hampshire's version differs from the Model Rule as follows:

a. Application of this Rule in (a) is limited to a "one time consultation with a client" instead of the ABA's version "short-term limited legal services to a client".

b. Section (c) is added.

2. The change in (a) is intended to give the attorney some clarity as to the scope of this Rule. This Rule relaxes certain of the normal conflicts limitations to allow this important pro bono service; this Rule applies only under circumstances where it is not reasonably possible for the attorney to otherwise comply with normal conflict of interest records checks procedures. Therefore, the situation where an attorney provides repeated services for the same client, and not a "one time consultation", would not permit any deviation from the normal conflicts rules.

3. The addition of Section (c) is intended simply to emphasize the attorney's continuing responsibility to maintain confidences under Rule 1.6, and the attorney's duties to a former client under Rule 1.9(c). This inclusion raises this language, already contained in ABA Comment [2], to Rule status.

4. The value of the services rendered to the public in this pro bono context is important enough to justify carving out a special exception to the normal

conflicts rules applicable in general client representation. In this special context, not even the protective "screening" rules, such as those adopted in 1.11(b), were employed.

5. Should a lawyer participating in a one-time consultation under this Rule later discover that the lawyer's firm was representing or later undertook the representation of an adverse client, the prior participation of the attorney will not preclude the lawyer's firm from continuing or undertaking representation of such adverse client. But the participating lawyer will be disqualified and must be screened from any involvement with the firm's adverse client. *See* ABA Comment [4].

Rule 7.1. Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. Without limiting the generality of the foregoing, a communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement, considered in light of all of the circumstances, not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

New Hampshire Comment:

The 2002 version of ABA Model Rule 7.1 eliminated subsections (a)-(c) of the former version of the Model Rule in favor of a more general prohibition on false or misleading communications. The New Hampshire rule retains subsections (a)-(c) because of the specific guidance they provide to the practitioner. At the same time, the New Hampshire rule adopts the general prohibition on false or misleading communications and provides explicitly that the subsections of the rule are illustrative, not limiting. New Hampshire Rule 7.1(a) also maintains the provision of the predecessor New Hampshire rule that a determination of whether a communication is materially misleading must be made "in light of all the circumstances."

Rule 7.2. Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay a fee charged by an organization that is recognized by the Internal Revenue Service as exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code; and

(3) purchase a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

New Hampshire Comment

The New Hampshire Rule differs from both the prior New Hampshire Rule and the Model Rule. Section (b)(2) limits the class of nonprofit entities to which referral fees may be paid to those that have obtained tax recognition of exemption. Model Rule (b)(4) is deleted.

Rule 7.3. Direct Contact With Prospective Clients

(a) A lawyer shall not initiate, by in-person, live voice, recorded or other real-time means, contact with a prospective client for the purpose of obtaining professional employment, unless the person contacted:

(1) is a lawyer;

(2) has a family, close personal, or prior professional relationship with the lawyer;

(3) is an employee, agent, or representative of a business, non-profit or governmental organization not known to be in need of legal services in a particular matter, and the lawyer seeks to provide services on behalf of the organization; or

(4) is an individual who regularly requires legal services in a commercial context and is not known to be in need of legal services in a particular matter.

(b) A lawyer shall not communicate or knowingly permit any communication to a prospective client for the purpose of obtaining professional employment if:

(1) the prospective client has made known to the lawyer a desire not to receive communications from the lawyer;

(2) the communication involves coercion, duress or harassment; or

(3) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the word "Advertising" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in subsection (a).

(d) The following types of direct contact with prospective clients shall be exempt from subsection (a):

(i) participation in a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live

voice or other real-time contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

(ii) initiation of contact for legal services by a non-profit organization.

(iii) contact of those the lawyer is permitted under applicable law to seek to join in litigation in the nature of a class action, if success in asserting rights or defenses of the litigation is dependent upon the joinder of others; and

(iv) requests by a lawyer or the lawyer's firm for referrals from a lawyer referral service operated, sponsored or approved by a bar association, or cooperation with any other qualified legal assistance organization.

New Hampshire Comment

New Hampshire Rule 7.3 differs from the Model Rule primarily in that:

1. It broadens the scope of potentially regulated contact to include initiation of any contact with a prospective client for the purpose of obtaining professional employment. The occurrence of actual "solicitation" raises evidentiary issues that are not necessary to reach.
2. It reinstates recorded contact as a regulated conduct, recognizing the growth of interactive recording technologies that may cause the prospective client to feel immediate pressure to respond.
3. It allows that motivators other than pecuniary gain may account for abusive conduct.
4. It assumes that entities, or individuals in a commercial context, will generally hold a more favorable balance of sophistication and leverage relative to the lawyer than will individuals acting outside of a commercial context, and so will generally need less protection against the "private importuning of the trained advocate." However, that balance is assumed to be negated for entities or individuals in a commercial context if they are known to be in need of legal services in a particular matter. This negation is intended to prohibit such activities as trolling through lists of new lawsuits and contacting defendants to solicit representation in the lawsuit.
5. Initiation of contact on behalf of class action and non-profit groups enjoy limited exemptions recognizing that such contact may be constitutionally protected.
6. Participation in a qualified legal services referral program is exempted.

Rule 7.4. Communications of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;

(b) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation; and

(c) a lawyer who is certified as a specialist in a particular field of law by an organization that has been accredited by the American Bar Association may hold himself or herself out as a specialist certified by such organization.

New Hampshire Comment

The New Hampshire version reorganizes and clarifies the language of the Model Rule.

Rule 7.5. Firm Names And Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

(c) Identification of the lawyers in an office of a law firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(e) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

New Hampshire Comment

The New Hampshire version separates Model Rule section (b), which contained two topics not necessarily related, into sections (b) and (c).

Rule 7.6. [the Committee recommends non-adoption of ABA Model Rule 7.6.]

New Hampshire Comment

Review of ABA Model Rule 7.6 is deferred and may be visited later. The Model Rule does not appear to have achieved general acceptance in other states.

Rule 8.1. Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

(c) fail to attend a hearing when ordered to do so by a disciplinary authority.

New Hampshire Comment

Rule 8.1(c) is retained from the prior New Hampshire Rules.

Rule 8.2. Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information received by lawyers during the course of their work on behalf of the New Hampshire Bar Association Ethics or Lawyers Assistance Committees.

New Hampshire Comment

Subsection (c) has been changed to permit members of the Lawyers Assistance Committee and the Ethics Committee of the New Hampshire Bar Association to refrain from disclosing information received by them during the course of their committee work. Lawyers are encouraged to seek assistance from these bodies.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official;

(e) state or imply an ability to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

New Hampshire Comment

Section (d) of the ABA Model Rule is deleted. A lawyer's individual right of free speech and assembly should not be infringed by the New Hampshire Rules of Professional Conduct when the lawyer is not representing a client. The deletion of section (d) was not intended to permit a lawyer, while representing a client, to disrupt a tribunal or prejudice the administration of justice, no matter how well intentioned nor how noble the purpose may be for the unruly behavior.

Model Rule section (e) is split into New Hampshire sections (d) and (e).

Rule 8.5. Disciplinary Authority; Choice of Law; Application of Rules to Nonlawyer Representatives

(a) *Disciplinary Authority.* A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer admitted in another jurisdiction but not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) *Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

(c) *Application of Rules to Nonlawyer Representatives.* Rules 1.2, 1.3, 1.4, 1.14, 1.15, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1, 4.2, 4.3, 4.4, 8.2(a), and 8.4 of the Rules of Professional Conduct shall apply to persons who, while not lawyers, are permitted to represent other persons before the courts of this jurisdiction pursuant to RSA 311:1. The committee on professional conduct shall have jurisdiction to consider grievances alleging violations of these Rules of Professional Conduct by nonlawyer representatives.

New Hampshire Comment

Section (c) is added to extend the disciplinary authority of the Rules to nonlawyers acting as legal representatives pursuant to New Hampshire law.

APPENDIX B

PRO BONO REFERRAL PROGRAM'S PROPOSAL TO REVISE RULE 6.1 OF THE RULES OF PROFESSIONAL CONDUCT

RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is

uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of

limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.